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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-32-2

Filed: 31 December 2020

Forsyth County, No. 16 CRS 57045

STATE OF NORTH CAROLINA

v.

AARON KENARD WESTBROOK, Defendant.

Appeal by defendant from order entered 31 August 2017 by Judge Stanley L. Allen in Forsyth County Superior Court. Heard in the Court of Appeals 8 August 2018, and decided by this Court in a decision issued 4 September 2018. On review in the Court of Appeals by reconvening order of the Supreme Court issued 4 September 2019, and entered in this Court 18 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woome-Deters, for defendant-appellant.

YOUNG, Judge.

Aaron Kenard Westbrook (defendant) appealed from the trial court's order requiring him to submit to satellite-based monitoring (SBM) for the remainder of his

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natural life. On appeal, this Court concluded that the State failed to meet its burden of showing that SBM constituted a reasonable search, and reversed. This matter has come before us once more on a reconvening order, to be reconsidered in light of our Supreme Court's decision in *State v. Grady*, ___ N.C. ___, 831 S.E.2d 542 (2019). We hold that *Grady* is inapplicable to the instant case, and therefore reaffirm our prior decision, and reverse.

I. Factual and Procedural Background

The facts of this case were set out in greater detail in our previous decision in this matter, *State v. Westbrook*, ___ N.C. App. ___, 817 S.E.2d 794 (2018) (unpublished). The salient facts, in short, are as follows: When defendant was approximately 21 years old, he was convicted of taking indecent liberties with a 15-year-old girl. While on probation, he was ordered to undergo sex offender treatment but failed to do so. During his probation, he sent a series of sexually explicit text messages to a 13-year-old girl who lived in his housing complex. He later masturbated while she watched.

Defendant was indicted for and pleaded guilty to three counts of taking indecent liberties with a child. He was sentenced to imprisonment, and the trial court further held a hearing on whether the imposition of SBM would be appropriate. Subsequently, the trial court ordered defendant to enroll in SBM for the remainder of his natural life. Defendant appealed.

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On appeal, this Court noted that the trial court's findings were not sufficient to determine whether SBM was a reasonable search for the purposes of the Fourth Amendment. Moreover, this Court held that the State failed to introduce any evidence regarding the SBM program's efficacy in protecting the public from recidivism, nor sufficient evidence that SBM was necessary to prevent defendant from reoffending. We therefore reversed the trial court's order imposing SBM.

Subsequently, our Supreme Court entered its decision in *State v. Grady*, ___ N.C. ___, 831 S.E.2d 542 (2019). The Court held that the SBM statute was categorically unconstitutional as applied to those who were only eligible for SBM on the basis of a finding of recidivism. As a result of this decision, this Court has entered reconvening orders on many of our recent SBM decisions, to be reconsidered in light of the *Grady* decision. Such is the case before us. The question for this Court is whether our Supreme Court's decision in *Grady* impacts our decision in the instant case, and if so, whether a change in our opinion is required.

II. *Grady*

In *Grady*, the defendant conceded that he met the statutory definition of a recidivist – “that is, a person who has a prior conviction for a reportable offense.” *Grady*, ___ N.C. at ___, 831 S.E.2d at 549; *see also* N.C. Gen. Stat. § 14-208.6(2b) (2017). The question before the Court was whether the imposition of SBM, which

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included “the GPS monitoring device itself and the 24/7 tracking[,]” was unconstitutional, either as a program altogether or as applied to the defendant.

The Court pursued extensive review. It noted, for example, that “the primary purpose of SBM is to solve crimes.” *Id.* at ___, 831 S.E.2d at 556. The Court noted, however, that this alone was not sufficient to hold the program to constitute a reasonable search; rather, it was necessary to review the totality of the circumstances, comparing the intrusion on the defendant’s Fourth Amendment interests with the promotion of legitimate governmental interests. *Id.* at ___, 831 S.E.2d at 557.

The Court held that defendants, having served their prison sentences and whose legal rights have been restored, did not have “a diminished expectation of privacy in their persons and in their physical locations at any and all times of the day or night for the rest of their lives.” *Id.* at ___, 831 S.E.2d at 561. As such, these individuals were still entitled to their Fourth Amendment right to privacy. The Court further held that,

in light of the physical intrusiveness of the [physical device], the quarterly equipment checks, and the extent to which GPS locational tracking provides an “intimate window” into an individual’s “privacies of life,” we conclude that the mandatory imposition of lifetime SBM on an individual in defendant’s class works a deep, if not unique, intrusion upon that individual’s protected Fourth Amendment interests.

Id. at ___, 831 S.E.2d at 564.

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Finally, the Court examined the State's argument that imposing SBM promoted the legitimate governmental interest in preventing crime. The Court held:

It is well established that the State bears the burden of proving the reasonableness of a warrantless search. *Coolidge*, 403 U.S. at 455, 91 S.Ct. 2022. While the State's asserted interests here are without question legitimate, what this Court is duty bound to determine is whether the warrantless search imposed by the State on recidivists under the SBM program actually serves those legitimate interests. The State has the burden of coming forward with some evidence that its SBM program assists in apprehending sex offenders, deters or prevents new sex offenses, or otherwise protects the public. Simply put, as the U.S. Supreme Court explained in *Ferguson v. City of Charleston*, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." 532 U.S. 67, 86, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (quoting *Edmond*, 531 U.S. at 42, 121 S.Ct. 447). Here, despite having the burden of proof, the State concedes that it did not present any evidence tending to show the SBM program's efficacy in furthering the State's legitimate interests. *Grady*, 817 S.E.2d at 27. We cannot simply assume that the program serves its goals and purposes when determining whether the State's interest outweighs the significant burden that lifetime SBM imposes on the privacy rights of recidivists subjected to it. *Cf. Doe v. Cooper*, 842 F.3d 833, 846 (4th Cir. 2016) ("[N]either anecdote, common sense, nor logic, in a vacuum, is sufficient to carry the State's burden of proof. Thus, while the State's argument may be conceptually plausible, it presented no evidence or data to substantiate it before the district court." (citing *United States v. Carter*, 669 F.3d 411, 418–19 (4th Cir. 2012))).

To be clear, the scope of North Carolina's SBM program is significantly broader than that of other states. Lifetime monitoring for recidivists is mandated by our statute for

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anyone who is convicted of two sex offenses that carry a registration requirement. A wide range of different offenses are swept into this category. For example, a court is required to impose lifetime SBM on an offender who twice attempts to solicit a teen under the age of sixteen in an online chat room to meet with him, regardless of whether the person solicited was actually a teen or an undercover officer, or whether any meeting ever happened. See N.C.G.S. § 14-202.3 (2017); *State v. Fraley*, 202 N.C. App. 457, 688 S.E.2d 778, *disc. rev. denied*, 364 N.C. 243, 698 S.E.2d 660 (2010). Not only does the lifetime imposition of SBM vastly exceed the likely sentence such an offender would receive on a second offense, in addition, the State has simply failed to show how monitoring that individual's movements for the rest of his life would deter future offenses, protect the public, or prove guilt of some later crime.

Applying the correct legal standard to the record in this case, we conclude that the State has not met its burden of establishing the reasonableness of the SBM program under the Fourth Amendment balancing test required for warrantless searches. In sum, we hold that recidivists, as defined by the statute, do not have a greatly diminished privacy interest in their bodily integrity or their daily movements merely by being also subject to the civil regulatory requirements that accompany the status of being a sex offender. The SBM program constitutes a substantial intrusion into those privacy interests without any showing by the State that the program furthers its interest in solving crimes that have been committed, preventing the commission of sex crimes, or protecting the public. In these circumstances, the SBM program cannot constitutionally be applied to recidivists in Grady's category on a lifetime basis as currently required by the statute.

Id. at ___, 831 S.E.2d at 568.

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The Court, in its conclusion, narrowly tailored its holding. The Court held that “[t]he generalized notions of the dangers of recidivism of sex offenders, for which the State provided no evidentiary support, cannot justify so intrusive and so sweeping a mode of surveillance upon individuals, like defendant, who have fully served their sentences and who have had their constitutional rights restored.” *Id.* at ___, 831 S.E.2d at 569. The Court therefore determined that “no circumstances exist” in which the imposition of SBM on a recidivist would be constitutionally valid, and therefore that SBM was categorically unconstitutional as applied to recidivists. *Id.* at ___, 831 S.E.2d at 570. However, the Court clarified that its decision “does not address whether an individual who is classified as a sexually violent predator, or convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen may still be subjected to mandatory lifetime SBM—regardless of whether that individual is also a recidivist.” *Id.* at ___, 831 S.E.2d at 572. The decision was specific to those defendants enrolled in SBM exclusively on the basis of having attained the status of a recidivist, and for no other reason.

III. Reconvening Review

Our prior decision in the instant case, however, was not premised upon defendant’s recidivist status. It was premised in part upon the insufficiency of the trial court’s findings, in part upon the State’s failure to demonstrate the efficacy of

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the SBM program generally, and in part upon the State's failure to demonstrate that the SBM program would be effective with respect to defendant specifically. We specifically held that "the State did not introduce any evidence regarding the efficacy of SBM in protecting the public from recidivism. Nor did the State demonstrate through competent evidence that the imposition of lifetime SBM was necessary in order to prevent Defendant – based on his particular circumstances – from reoffending." *Westbrook*, ___ N.C. App. ___, 817 S.E.2d 794. We concluded that, because the State had failed to meet this burden, the trial court's order was subject to reversal. Moreover, we held that because the State was not entitled to a second chance to meet that burden, this would be a reversal without remand. These holdings were consistent with, and compelled by, this Court's holdings in *State v. Grady*, 259 N.C. App. 664, 817 S.E.2d 18 (2018), which were affirmed by the Supreme Court.

We recognize and respect the authority established by our Supreme Court in *Grady*. However, that case was explicitly limited to matters concerning recidivism. Our prior decision in this matter was not premised upon the defendant's status as a recidivist, but upon the State's failure to show the efficacy of the SBM program in enforcing legitimate governmental interests. Moreover, our prior decision in this matter concerned a defendant who engaged in illicit and unlawful acts with a minor; the Court in *Grady* explicitly noted that its holding did not apply to such a situation. Accordingly, we hold that our previous decision in this matter was properly decided,

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and for the same reasons as in that case, we reverse the order of the trial court imposing SBM.

REVERSED.

Judge DILLON concurs.

Judge INMAN concurs in separate opinion.

Report per Rule 30(e).

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INMAN, Judge, concurring in the result only.

I agree that, reconsidering this matter in light of *State v. Grady*, 372 N.C. 509, 545, 831 S.E.2d 542, 568 (2019) (*Grady III*), the satellite-based monitoring (“SBM”) order entered below should be reversed. I write separately because I disagree with the majority’s analysis.

We do not write on a blank slate in applying *Grady III* to this case. Following *Grady III* and this Court’s post-*Grady III* decisions, I cannot agree with the majority’s assertion that “*Grady [III]* is inapplicable to the instant case.” **[Maj. Op. p 2]**

Our prior opinion in this case noted that “[d]uring [the SBM] hearing, the State requested that Defendant be enrolled in SBM pursuant to N.C. Gen. Stat. § 14-208.40A(c) on the ground that he was a recidivist.” *State v. Westbrook*, 261 N.C. App. 310, 817 S.E.2d 794, 2018 WL 4200974, *1 (2018) (unpublished). The trial court’s order imposing lifetime SBM found that Defendant was a recidivist subject to SBM. **[R p 26]** To the extent that the trial court’s lifetime SBM order was based solely on Defendant’s status as a recidivist, reversal is mandated by *Grady III*.

The trial court also found that Defendant had committed a sexually violent offense and an offense that involved the physical, mental, or sexual abuse of a minor. **[R p 26]** Although our Supreme Court in *Grady III* limited its holding that lifetime SBM under North Carolina’s statutory scheme is facially unconstitutional to

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offenders “who are subject to mandatory lifetime SBM based solely on their status as a ‘recidivist,’ ” *Grady III*, 372 N.C. at 511, 831 S.E.2d at 547, this Court has nonetheless applied the analysis employed in *Grady III*, and in particular the totality of the circumstances test, to SBM orders imposed on non-recidivists. *See, e.g., State v. Griffin*, ___ N.C. App. ___, ___, 840 S.E.2d 267, 273 (applying the totality of the circumstances test explained in *Grady III* to a defendant subject to SBM for conviction of an offense involving the physical, mental, or sexual abuse of a minor), *temp. stay allowed*, 374 N.C. 265, 838 S.E.2d 460 (2020); *State v. Hutchens*, ___ N.C. App. ___, ___, 846 S.E.2d 306, 311 (2020) (applying the same to a defendant subject to SBM for commission of a sexually violent offense); *State v. Strudwick*, No. COA18-794-2, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2020 WL 5901181, *2, slip op. at *4 (“Although *Grady III*’s holding does not directly apply to Defendant in this case, who was not classified as a ‘recidivist,’ the analysis of the issue described in *Grady III* does apply to this case.” (citation omitted)), *temp. stay allowed*, ___ N.C. ___, 848 S.E.2d 496 (2020).

Griffin and *Strudwick* have been stayed pending review by the Supreme Court. *Hutchens* has not been stayed and thus remains binding precedent. *Hutchens* noted that this Court’s reasoning in *Griffin*, though not binding because of the stay pending Supreme Court review, was nonetheless compelling enough to be followed. *Hutchens*, ___ N.C. App. at ___, 846 S.E.2d at 311. *Hutchens* is binding here.

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Consistent with the Supreme Court's analysis in *Grady III*, and with this Court's analysis in post-*Grady III* decisions, including *Hutchens*, our prior opinion in this case noted that:

the trial court made *no* findings reflecting that it had actually considered the totality of the circumstances in determining that SBM was appropriate Moreover, the State did not introduce any evidence regarding the efficacy of SBM in protecting the public from recidivism. Nor did the State demonstrate through competent evidence that the imposition of lifetime SBM was necessary in order to prevent Defendant—based on his particular circumstances—from reoffending.

Westbrook, 2018 WL 4200974 at *4. This Court's prior opinion held that the trial court's absence of findings and the State's failure of proof regarding the efficacy of SBM precluded us from holding that the trial court's SBM order was reasonable under the totality of the circumstances. Consistent with the Supreme Court's analysis in *Grady III* and this Court's decisions applying *Grady III*, I would hold that considering the totality of circumstances in the record before us, lifetime SBM is unconstitutional in this case.

For these reasons, I respectfully concur only in the result.